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Connecticut Bar Association
Human Rights and Responsibilities Section
In Support of
HB 6599, An Act Concerning Discrimination

Judiciary Committee

Senator Coleman, Representative Fox and Members of the Judiciary Committee:

The Human Rights and Responsibilities Section of the Connecticut Bar Association urges you to favorably report House Bill 6599, An Act Concerning Discrimination. The Connecticut Bar Association Human Rights and Responsibilities Section is comprised of approximately 80 attorneys who are interested in legislation concerning civil rights and discrimination law.

House Bill 6599 will provide protection against discrimination on the basis of gender identity or gender expression in employment, housing and public accommodations, as well as in several other contexts. The proposed legislation essentially codifies the Declaratory Ruling in the matter of John/Jane Doe, issued by the Commission on Human Rights and Opportunities on November 15, 2000. The Doe Declaratory Ruling clearly points out that developing authority in the courts clarifying that gender identity and expression are covered under the prohibition of discrimination on the basis of gender in nondiscrimination statutes including but not limited to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and the Equal Credit Act.

In the Doe Declaratory Ruling, the Commission adopted the definition of "gender identity" as "having or being perceived as having a self-image, expression or identity not traditionally associated with one's sex at birth." Doe Declaratory Ruling, page 20 quoting from Leonard, "The New York Law School Journal of Human Rights, CHRONICLING A MOVEMENT: A Symposium to Recognize the Twentieth Anniversary of the Lesbian/Gay Law Notes" (2000). "'[G]ender identity' concerns which gender an individual feels s/he is." Doe Declaratory Ruling, Page 20 note 16.

The Declaratory Ruling acknowledged the developing legal authority clarifying the protections included in gender anti-discrimination law. The Court considered sex stereotyping to be another form of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Doe Declaratory Ruling, p.14 in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (Hopkins candidacy for partnership was denied because she did not act femininely enough, she was accused of being "aggressive," "macho," somewhat masculine...." "[H]er employers determined that [Hopkins] failed to conform to socially constructed gender expectations." Doe, p. 14) "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Doe p.14 (quoting from Price Waterhouse, 490 U.S. 250.) Other courts have followed the Price Waterhouse analysis.

The Court applied the Equal Protection Clause to gender stereotyping and held that that "the Equal Protection Clause requires state actors to look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." Doe Declaratory Ruling, p. 15-16 (quoting from J.E.B. v. Alabama, 511 U.S. 127, 140 n.11 (1994)(selection and exclusion of jurors on the basis of gender is impermissible).)

The Ninth Circuit applied Title VII in a case where a prison guard abused a male prisoner who did not act like a male. The Court found that "Under Price Waterhouse, "sex" is the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII." Doe Declaratory Ruling p.18 quoting from Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000). The First Circuit applied the Equal Credit Opportunity Act in Rosa v. Park West Bank and Trust Company, 214 F.3d 213 (1st Cir. 2000)(loan applicant was sent home to change clothing when his clothing did not match the gender in his identification papers). (Also See: Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, Ohio, 378 F.3d 566 (2004); Mitchell v. Axcan Scandipharm, Inc., 2006 WL 456173 (W.D. Pa); Tronetti v. TLC Healthnet Lakeshore Hospital, 2003 WL 22757935 (W.D.N.Y. 2003)). Another court urged a simpler and more direct approach:

> "... discrimination against transsexuals because they are transsexuals is "literally" discrimination "because of ... sex." (*quoting* from Ulane v. Eastern Airlines, 581 F.Supp. 821, 825; *reversed,* 742 F.2d 1081 (1984), *cert. denied,* 471 U.S. 1017 (1985)). That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality -- chromosomal, gonadal, hormonal, and neurological – interact with each other, and in turn, with social, psychological, and legal conceptions of gender."
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> "Dealing with transsexuality straightforwardly, and applying Title VII to it (if at all) as discrimination because of ...sex," preserves the outcomes of the post–Price Waterhouse caselaw without colliding with the sexual orientation and grooming codelines of cases...."

Schroer v. Billington, Librarian of Congress, 424 F.Supp.2d 203, 210 (2006). Schroer recommended that Judge Grady's decision (Trial court in Ulane) be revisited. Another court stated that "Transexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex." Tronetti, supra, 2003 WL 22757935 *4. In the final decision on the merits of the case in Schrorer, the District Court held that an employment decision based upon the sex (current anatomical or future anatomical) or other expression or identity of sex is still sex.

> For Diane Schroer to prevail on the facts of her case, however, it is not necessary to draw sweeping conclusions about the reach of Title VII. Even if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law-after that approach "has been eviscerated by *Price Waterhouse,*" *Smith,* 378 F.3d at 573-the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination "because of ... sex."

Schroer v. Billington, 577 F.Supp.2d 293, 307 -308 (D.D.C.,2008).

> In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination.

Id., Schroer v. Billington, 577 F.Supp.2d at 308.

As the Doe Declaratory Ruling explains, the case law authority interpreting gender identity and expression discrimination as gender discrimination continues to grow. The Doe Declaratory Ruling (p.20) concluded that "[P]rejudice and bigotry unfortunately are still prevalent in our society and they are facts to which we cannot close our eyes and pretend they do not exist." The Commission's Declaratory Ruling held that discrimination on the basis of gender identity or expression would violate Connecticut's ban on sex discrimination. Adding to the statute specific language with respect to gender identity or expression clarifies the statute to all readers and confirms the State's commitment to all of its citizens.